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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Missouri	)	CC Docket No. 01-88

COMMENTS OF
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Dated: April 24, 2001

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SUMMARY

Competition has failed to take root in the State of Missouri because a combination of high prices and anticompetitive tactics on the part of Southwestern Bell Telephone has impeded the development of competition in the state. SWBT attempted to overcome the inherent lack of competition in Missouri by offering a mega-interconnection agreement, the M2A, that in many areas went beyond what it had ever offered competitors in the state of Missouri before. In effect, SWBT offered the M2A as a "proxy" for checklist compliance. This still was not enough for the Missouri PSC, and SWBT had to make several last-minute concessions to bring its application into accord with the competitive checklist.

SWBT is now attempting to parlay the M2A along with its Section 271 grants in Texas, Kansas and Oklahoma into a Section 271 grant for Missouri. There are several reasons, however, why the Commission should reject this Application. First, SWBT has failed to show compliance with the FCC's pricing rules. Unlike other applications that obtained approval, SWBT's Missouri Application does not show a "full-suite of TELRIC rates." In fact, a significant amount of rates are interim and many have never been evaluated to see if they comply with TELRIC principles. Whatever permanent rates that were set by the Missouri PSC were found to be excessively high and quite disparate to rates in other SWBT states. There have been some rates that have been interim rates for over two years. Rates for loop conditioning are so high that they serve as a barrier to entry to the advanced services market. Rates for collocation are so high that they impede the development of facilities-based competition.

In an effort to bring this rate structure into line with the requirements of the competitive checklist, SWBT used a combination of rate reductions and interim pricing to try to conform its rates to those it offered in Texas, Kansas and Oklahoma. Instead of demonstrating a rate

structure that has historically conformed to TELRIC-principles, SWBT is trying to construct one at the last minute. In particular, SWBT relies extensively on the use of interim prices. The rates for loop conditioning, line sharing, collocation, and a substantial amount of UNEs are all interim. The Commission has allowed use of interim pricing in limited circumstances before, but in this case the exception literally swallows the rule. The rate structure in the current version of the M2A bears little relation to the rate structure that has been operational in Missouri.

This is not to say that voluntary rate reductions and use of advantageous interim prices should not be encouraged. The concern, however, is that given the lack of a history of pro-competitive, TELRIC rates in Missouri, the rates in the M2A will be quickly abandoned once SWBT obtains approval for Section 271 authority. In fact, the rates for loop conditioning, line sharing, collocation, and 95 of the UNEs offered in the M2A are all being evaluated currently by the Missouri PSC. Once permanent rates are set for these items, they will replace the corresponding M2A rates, and CLECs will be required to true-up to the new rates. The history of pricing in Missouri does not give one much confidence that pro-competitive rates will emerge out of the pending rate proceedings. The Commission has been wary of sanctioning the excessive use of interim rates. The Commission should wait to see how the M2A operates in promoting competition, and what permanent rates replace the interim rates before granting SWBT's application. There is certainly nothing in SWBT's pricing in Missouri up to this point that would warrant a finding that SWBT meets the requirements of the checklist.

Another reason to withhold approval of SWBT's application is SWBT failure to provide nondiscriminatory access to OSS. SWBT's OSS performance in Missouri has failed to meet numerous applicable benchmarks, and is consistently lower in comparison to SWBT's OSS performance in other states. There are also concerns about the scalability of SWBT's OSS. If

SWBT's OSS is experiencing troubles with the limited state of competition in Missouri, these troubles will be exacerbated when commercial volumes increase.

SWBT's OSS has experienced significant deficiencies in the ordering and billing stages. SWBT has very low flow-through rates which means that a significant amount of orders submitted electronically are being manually processed. This greatly heightens the potential for delay and error. The problem has been compounded by a lack of personnel at SWBT service centers. Once again, as the volumes of orders increase this problem will only grow worse.

SWBT also fails to meet the fundamental task of compliance with the performance standards mandated by checklist item 4 of the Competitive Checklist for the provision of unbundled local loops. SWBT has failed to meet performance measures in the provision of stand-alone loops, loops used for line sharing, DS1 loops and BRI loops.

The Commission should deny this application as contrary to the public interest. Two of the relevant concerns in evaluating the public interest are the current state of local competition, and whether the competition has taken root such that markets will remain open. SWBT ignores such considerations, and instead essentially argues that its purported checklist compliance renders the public interest standard superfluous. The Commission has held the public interest standard to be a separate standard. To give proper weight to this important consideration, the Commission should require SWBT to show why its application is truly in the public interest. In addition, states should be encouraged to create a more detailed record of why a Section 271 application will serve the public interest. Sadly, in the Missouri proceeding, the public interest inquiry was confined to an examination of the checklist. A more detailed evaluation of the public interest would have shown that competition had not developed in Missouri, and is not likely to do so, unless SWBT's anticompetitive prices and practices are stopped.

SWBT's practices, including its pricing, OSS, and loop provisioning, have precluded the development of viable competition. Competition has been further stalled by anticompetitive practices such as precluding the ability of facilities-based CLECs to participate in the Metropolitan Calling Area plan. The future, even with the M2A, does not seem much brighter if the terms, conditions, and prices of the M2A are merely an interim measure to garner Section 271 authority. The Commission should wait and see if the M2A has the effect of creating competition, and if the permanent prices set in Missouri accord with TELRIC principles. There should not be a rush to grant approval on this application, particularly since the performance of SWBT in Missouri up to this point counsels for denial of the application.

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In the Matter of	)	
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Application by SBC Communications, Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 01-88
Southwestern Bell Communications Services, Inc.	)	
d/b/a Southwestern Bell Long Distance for	)	
Provision of In-Region, InterLATA Services in	)	
Missouri	)	

COMMENTS OF EL PASO NETWORKS, LLC AND PACWEST TELECOM, INC.

El Paso Networks, LLC ("El Paso"), and PacWest Telecom, Inc. ("PacWest") ("Commenters") submit these comments concerning the above-captioned Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance ("SBC") for Provision of In-Region, InterLATA Services in Missouri filed April 4, 2001 ("Application").[1] For the reasons stated herein, the Federal Communications Commission ("Commission") should deny the Application.

I. THE APPLICATION DOES NOT DEMONSTRATE COMPLIANCE WITH THE FCC's PRICING RULES

A. Legal Standard

Checklist Item 2 of Section 271 states that a Bell Operating Company ("BOC") must provide "nondiscriminatory access to network elements in accordance with the requirements of

[1] Comments Requested on the Application By SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Missouri, Public Notice, CC Docket No. 01-88, DA 01-768, released April 4, 2001.

sections 251(c)(3) and 252(d)(1) of the Act."[2] Section 251(c)(3) requires LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . ."[3] Section 252(d)(1) mandates that state commissions should determine just and reasonable rates for network elements that are nondiscriminatory and based upon the cost of providing the network element.[4] The Federal Communications Commission ("FCC" or "Commission") has determined that prices for unbundled network elements (UNEs) must be based on the total element long run incremental cost ("TELRIC") of providing those elements.[5]

B. SWBT's Use of Interim, Unreviewed, Or Unnecessarily High Rates Does Not Show Compliance With the Competitive Checklist

In Missouri, SWBT has implemented a combination of rate reductions and modifications in an attempt to bring its pricing into compliance with the requirements of the Commission. For many network elements, SWBT has also established only interim rates some of which have never been reviewed by the Missouri PSC. On June 28, 2000, SWBT filed a Missouri 271 Interconnection Agreement ("M2A") which is modeled after the Texas 271 Interconnection Agreement ("T2A"). The M2A as originally filed generally followed the substantive terms of the T2A but incorporated the Missouri-specific rates set by the Missouri Public Service Commission ("Missouri PSC").[6] In order to obtain the Missouri PSC's endorsement of its

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2 47 U.S.C. § 271(B)(ii).

3 47 U.S.C. § 251(c)(3).

4 47 U.S.C. § 252(d)(1). The State Commissions may factor in a reasonable profit when basing rates upon costs.

5 *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, ¶ 16 (Apr. 16, 2001) ("*Verizon MA 271 Order*").

6 *Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region, InterLATA Services Originating in Missouri Pursuant to Section 271 of the*

application, SWBT reduced nonrecurring charges by up to 25% and applied the interim rates used in Texas for loop conditioning, line sharing, collocation, and 95 other UNE subject to true-up when the Missouri PSC issues permanent rates on those services.[7]

This is not the first time applicants have made "voluntary" reductions in their pricing for unbundled network elements to come into compliance with the requirements of the competitive checklist. In Massachusetts, Verizon lowered its UNE rates for switching, transport and switch ports to those it currently has in effect in New York.[8] In Kansas and Oklahoma, Southwestern Bell Telephone ("SWBT") made "uniform percentage rate reductions, subject to specified rate floors, in certain categories of rates in Oklahoma and Kansas."[9] The Commission noted that these rate reductions did not modify the rate structure developed in state proceedings.[10]

Unlike the situations in Kansas, Massachusetts, and Oklahoma where this Commission gave some latitude for applicants to make limited modifications to their pricing to bring their rate structure into conformance into compliance with the checklist, SWBT's application in Missouri presents a large scale modification of rates structure. Unlike in the other states, there is no history of compliance for SWBT's Missouri rates with this Commission's pricing rules. This Commission has held that in order to gain in-region, interLATA entry, a BOC must "support its application with actual evidence demonstrating its present compliance with the statutory

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Telecommunications Act of 1996, Missouri PSC Case No. TO-99-227, Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement, p. 7 (Mar. 15, 2001) ("*MO PSC 271 Order*").

[7] *MO PSC 271 Order* at pp. 32-35.

[8] *Verizon MA 271 Order* at ¶ 18.

[9] *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, ¶ 23 (Jan. 22, 2001) ("*SWBT KS/OK 271 Order*").

[10] *Id.*

conditions for entry, instead of prospective evidenced that is contingent on future behavior."[11] Thus, this Commission must not only consider the rates offered by SWBT in the final version of the M2A, but also the evidence of SWBT's compliance (or lack thereof) with the pricing requirements of the checklist prior to its Application. SWBT's rate structure as encapsulated in its final version of the M2A suffers from a triple set of infirmities. One, it relies too much on interim rates. Two, it includes too many rates that have never been reviewed by the Missouri PSC. Three, it contains high rates. Each of these three factors alone has given this Commission cause for concern in the past. All three factors operating together counsel for rejection of the Application.

1. SWBT's Pre-Application Pricing

When SWBT initially presented its proposed M2A to the Missouri PSC it contained Missouri-specific rates. The pricing SWBT included in its original version of the M2A came from a number of sources including two arbitrations that determined Missouri's permanent UNE rates.[12] The Missouri PSC Staff found that the rates for UNEs in Missouri were higher in most categories than the prices in Texas, and higher in a number of categories than in Kansas or Oklahoma.[13] Staff found that there was "no evidence to explain the price differences between Missouri and the other states" and that these differences in pricing may lend credence to

[11] *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 at ¶ 67 (June 30, 2000) ("*SBC TX 271Order*")

[12] *AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-97-40; *AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-98-115.

[13] MO PSC Case No. TO-99-227, Staff's Response to Southwestern Bell Telephone Company's Updated Record at p. 7 (Aug. 28, 2000) ("*Staff's August Comments*"). *See*, Appendix A to *Staff's August Comments* in which Staff did a pricing comparison.

allegations that "prices are not TELRIC based."[14] In particular, nonrecurring charges in Missouri were substantially higher than those in Texas.[15]

In one of the arbitrations that set Missouri UNE rates, Case No. TO-98-115, a significant portion of the nonrecurring charges were not made permanent but instead adopted on an interim basis.[16] The interim rates were set in January 1998, and a procedural schedule was adopted to set permanent rates. Unfortunately, there has been no activity in the case since February 1999.[17] The Missouri PSC Staff noted that these rates have been interim for over two and half years and recommended that these rates be resolved prior to the Missouri PSC issuing any recommendation on SWBT's application. Staff noted that, unlike the interim rates that the FCC found to be acceptable in the Texas 271 proceeding, the interim Missouri rates were not subject to true-up and additionally were not the subject of an active case seeking to establish permanent rates.[18]

Staff also discovered that some of the M2A pricing is higher than the Missouri PSC approved rates and that some prices were never reviewed by the Missouri PSC, much less approved.[19] In regard to the former, for instance, the price SWBT set in the M2A for DS3 Interoffice Transport – Suburban Termination is $2,783.40 while the price set in arbitrated agreements was $1,824.14. In addition, the M2A contained 95 UNE rates that had never been

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14 *Id.*

15 *MO PSC 271 Order* at 33.

16 *Staff's August Comments* at 6.

17 *Id.*

18 *Id.*

19 *Id.* at 8.

reviewed or approved by the Commission.[20] Staff found that there was no evidence to show that these prices were reasonable or conform to FCC pricing guidelines.[21]

In addition to the instances mentioned above, there are significant areas, such as loop conditioning, line sharing, and collocation in which permanent TELRIC-based prices have not been set. The following is a summary of the status of pricing in those areas.

a. Loop Conditioning/Line Sharing

Prices for loop conditioning and qualification were adopted by the Missouri PSC in an arbitration.[22] The prices are unreasonably high, and in most cases lead to carriers paying $727 to condition a loop up to 17,500 feet, and more if the loop is longer than 17,500 feet. For instance, to have a load coil removed from a loop costs in the range of $1,000 for what is essentially a 20-30 minute procedure.[23] These rates were challenged in a subsequent arbitration in which the CLEC argued, among other things, that SWBT's loop conditioning charges were based on inflated task times and inefficient practices such as conditioning loops one at a time that would find no place in a TELRIC-based methodology.[24] Staff of the Missouri PSC concurred on these issues, but the Missouri PSC declined to reduce the charges.[25] Instead, the Missouri PSC ordered SWBT to develop studies to address the issue. The problematic aspect of this ruling was that it continued to apply the exorbitant loop conditioning charges and did not make them interim subject to true-up. As the Staff noted in its report on this application:

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[20] *Id.*

[21] *Id.*

[22] *Staff's August Comments* at 9.

[23] MO PSC Case No. TO-99-297, Transcript of October 12, 2000 Hearing at 2538-2539 (Oct. 12, 2000) ("10/12 Tr.").

[24] *Petition of Dicea Communications, Inc., d/b/a Covad Communications Company, for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company*, Case No. TO-2000-322, Arbitration Order (2000).

> [t]he concern of Staff is that these prices established in the Covad arbitration are not interim, subject to true-up, even though the Commission required cost studies for review of these rates next year. This may raise concerns at the FCC that the prices are not TELRIC based, in that the Commission wanted further review on the costs involved.[26]

Staff did a price comparison and noted that there are significant price differences for xDSL services in Texas and Missouri.[27] SWBT noted in testimony in a proceeding evaluating its loop conditioning rates in Oklahoma that:

> [t]he design of SWBT's outside plant, specifically the use of load coils, bridged taps and repeaters, is the same in all five SWBT states. The time that it takes to remove load coils, bridged taps and repeaters is the same in all five states.[28]

If the work involved is the same there is no justification for such disparities in the rates. Staff was right to question the disparities in the rates.[29] The excessive loop conditioning rates and the disparities between the states show that SWBT has failed to set TELRIC-based loop conditioning rates in Missouri.

SWBT's permanent rates for line sharing have not been set. Staff noted that SWBT had raised the cross-connect recurring, initial nonrecurring, and additional nonrecurring charges from $0.52 to $0.90, $135.56 to $167.88, and $86.28 to $103.23 respectively.[30] SWBT provided no explanation for this increase.[31] In addition, there appeared to be differences in pricing between the proposed amendment and what SWBT was charging its affiliate, ASI. For instance, CLECs

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25 *Id.*

26 *Staff's August Comments* at 10.

27 *See* Appendix C to *Staff's August Comments.*

28 *Application of Southwestern Bell Telephone Company for Approval of Nonrecurring Rates for Conditioning Unbundled Digital Subscriber Line ("DSL") Capable Loops*, Oklahoma Corporation Commission Cause No. PUD 200000192, Rebuttal Testimony of Dave Borders at 4 (August 2, 2000).

29 Staff was likewise concerned why even though SWBT uses a region-wide OSS system, the OSS charges are higher in Missouri compared to Texas. MO PSC Case No. TO-99-297, Transcript of October 11, 2000 Hearing at 2261 (Oct. 11, 2000) ("10/11 Tr.")..

30 *Staff's August Comments* at 23.

under the M2A would be charged $0.61 for a line sharing OSS charge while there is no charge for ASI.[32]

b. Collocation[33]

On October 24, 2000, SWBT filed a collocation tariff.[34] The Missouri PSC has suspended the tariff and initiated a proceeding to determine appropriate collocation prices, terms and conditions.[35] Until that point, SWBT used individual case basis ("ICB") pricing for collocation. In the SWBT region, the only other state that allowed it to use ICB pricing was Arkansas, a state that has unequivocally stated that it will not review SWBT's prices for collocation.[36] SWBT was ordered to file a collocation tariff in Texas, Oklahoma and Kansas. SWBT's use of ICB pricing resulted in collocation rates that were dramatically higher – often by several hundred percent – than the rates charged by SWBT in Texas and by other major ILECs in other states.[37]

SWBT's filing of a collocation tariff did not do much to reduce the disparity in collocation rates in the SWBT region. Staff found that "SWBT charges CLECs significantly more for collocation in Missouri than in Texas, Oklahoma, or Kansas."[38] Staff also found the

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31 *Id.*

32 *Id.*

33 Collocation is normally considered under Checklist Item 1. Since the issues of collocation pricing relate so closely to UNE pricing issues they are discussed here.

34 *MO PSC 271 Order* at 27.

35 *Id.*

36 *Petition of Connect Communications Corp., DSLnet Communications, LLC, KMC Telecom III, Inc., and New Edge Network, Inc. for an Order Requiring Southwestern Bell Telephone Company to file a Collocation Tariff*, Arkansas PSC Docket No. 00-047-U, Order No. 4 (May 12, 2000).

37 MO PSC Docket No. TT-2000-527, *Application of Allegiance Telecom of Missouri, Inc., CCCMO d/b/a Connect!, DSLnet Communications, LLC, KMC Telecom III, Inc., and New Edge Network, Inc. for an Order Requiring Southwestern Bell Telephone Company to file a Collocation Tariff*, Application at 6 (Feb. 24, 2000). *See* Appendix G to SWBT Application, Tab 31.

38 *Staff's August Comments* at 14.

rates "still a significant barrier to entry into the local market in Missouri."[39] This disparity in collocation rates is puzzling as cost drivers for collocation in the region are such that while there might be minor differences in rates, the rates should be fairly similar.[40]

Staff stated it was unclear what methodology SWBT used in determining its proposed collocation rates and whether those rates complied with FCC pricing guidelines.[41] The Staff also stated that the rates were not supported by Missouri specific evidence.[42] The Staff also concluded that "there are far too many inputs used in setting the proposed tariff rates which have not undergone analysis" to determine if the rates comply with the Commission's pricing orders.[43] This situation was compounded by the fact that since SWBT used ICB pricing for collocation, there has been no review of collocation rates at all up to this point.[44] Based on the history of collocation in Missouri, Staff recommended that any collocation offering should be in "place for a period of time *before* this Commission makes its decision regarding approval of SWBT's § 271 application."[45] Staff found that "SWBT has simply failed its burden to establish that proposed rates for collocation, either in the M2A or proposed tariffs, conform to proper costing principles; further, SWBT has not shown that its proposed terms and conditions are being offered in a nondiscriminatory manner."[46]

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[39] *Id.*

[40] 10/11 Tr. at 2253.

[41] *Staff's August Comments* at 14.

[42] MO PSC Case No. TO-99-297, Staff's Response to the Second Question and Answer Session, and to Presentation of Ernst & Young at 23 (Nov. 30, 2000) ("*Staff's November Comments*").

[43] *Id.* at 23-24.

[44] *Id.* citing Kohly, Tr. At 2875-2876.

[45] *Id.* at 27.

[46] *Id.* at 34.

This Commission's pricing rules require that "in order to comply with its collocation obligations, an incumbent LEC provide collocation based on TELRIC."[47] The record does not support that SWBT is providing collocation based on TELRIC, or that its collocation rates have ever conformed to TELRIC principles.

2. SWBT's Promises of Future Performance

If one took a snapshot of SWBT's application in regard to pricing for UNEs and interconnection at the start of this year, there is little doubt the application would have been found to fail to comply with the pricing requirements of the competitive checklist. The Missouri PSC issued an order in February 2001 which confirmed this fact.[48] The Missouri PSC found that the M2A offered to CLECs "as is" would not meet the terms of the competitive checklist.[49] Specifically the Missouri PSC found:

- The prices for collocation have not been reviewed to determine if they meet the appropriate FCC standards;[50]
- The prices for 95 unbundled elements have not been reviewed by the Missouri PSC for conformance with FCC's standards;[51]
- The prices for loop conditioning have not been determined by the Missouri PSC to comply with the FCC's standards;[52]
- SWBT's nonrecurring charges in Missouri need adjustment.[53]

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47 *SBC KS/OK 271 Order* at ¶ 236.

48 MO PSC Case No. TO-99-227, Interim Order Regarding the Missouri Interconnection Agreement (Feb. 13, 2001) ("*MO PSC Interim Order*")

49 *Id.* at 2-3.

50 *Id.* at 4.

51 *Id.* at 5.

52 *Id.* at 6.

A mere two months later, however, this Commission received SWBT's application for Section 271 authority in Missouri with the endorsement of the Missouri Public Service Commission. The Missouri PSC felt that SWBT's combination of interim pricing and "voluntary" rate deductions would bring SWBT's pricing into conformance with the checklist.[54]

The Commission should recognize, however, that the problems with SWBT's pricing in Missouri are more pervasive and deep-rooted than in other states. Unlike the full suite of TELRIC-based rates the Commission described in New York, there are perhaps as many rates in Missouri that have not been demonstrated to be in compliance with TELRIC principles. The latitude the Commission gave to other applications on pricing issues is not warranted here.

SWBT's application contains an over-reliance on interim rates. The following rates are interim in Missouri: 1) the rates from Case No. TO-98-115; 2) the 95 UNE rates; 3) loop conditioning rates; 4) line sharing rates; 5) collocation rates. The FCC first addressed the issue of interim rates in its *BANY 271 Order* and created a limited exception for use of interim rates. The Commission noted:

> [w]e believe that this question should be addressed on a case-by-case basis. If the uncertainty caused by the use of interim rates can be minimized, then it may be appropriate, at least for the time being, to approve an application based on the interim rates contained in the relevant tariff. Uncertainty will be minimized if the interim rates are for a few isolated ancillary items, permanent rates that have been established are in compliance with our rules, and the state has made reasonable efforts to set interim rates in accordance with the Act and the Commission's rules.[55]

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[53] *Id.* at 7.

[54] MO PSC Case No. TO-99-227, Transcript of January 31, 2001 Hearing at 3123-3128 ("1/31 Tr.")

[55] *BANY 271 Order* at ¶ 258.

SWBT's application is one in which the exception swallows the rule. These interim rates cover not just ancillary items, but a substantial component of SWBT's rates in Missouri. At the hearing on the Application in October of last year, one witness noted that:

> [I]t does not surprise me that competition [in Missouri] has not progressed any further than it has, because from a CLEC perspective it's very difficult to enter a market when there are large numbers of unknowns as to how much it's going to cost you to build out a network, what it's going to cost you to order key components of that network from an unbundled standpoint. So I'm personally not surprised that it hasn't developed any further than it has because from a contractual standpoint, things are only recently beginning to get clarified and, in fact, they're not yet finalized in the state of Missouri.[56]

Since that time the M2A has been modified to include more interim rates, an event that only adds to the uncertainty in Missouri. The prices, although improved from what was offered in the original iteration of the M2A, are in many cases subject to be trued-up in pending price proceedings before the Missouri PSC. The eventual outcome of the Missouri PSC's price proceedings to set the permanent rates for loop conditioning, line sharing, collocation and the UNEs is far from clear. The high UNE rates in place up to this point do not provide much confidence, much less certainty, that the prices will be pro-competitive. The Missouri PSC's confidence in the permanent rates it has already set is belied by its own concerns over how high the rates are particularly in relation to other states.[57] The Missouri PSC would not have required SWBT to make across-the-board reductions in rates if it felt that its pricing methodology was truly in conformance with the FCC's pricing principles.

In addition, even the permanent rates in Missouri are uncertain, because the prices set in the arbitrations have been vacated by the U.S. Court of Appeals for the Eighth Circuit in *Southwestern Bell Telephone Company v. Missouri Public Service Commission*, 236 F.3d 922

[56] 10/11 Tr. at 2298-2299.

[57] *See* 10/12 Tr. at 2516.

(8^{th} Cir. 2001). The Eighth Circuit has invalidated the arbitrated agreements and directed the Missouri PSC to use a pricing methodology consistent with its ruling in *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8^{th} Cir. 2000). Thus, there is ample uncertainty even as to the permanent rates set by the Missouri PSC.

This case is a prototypical example of a situation where it is imprudent to rely on interim rates. There has not been a sufficient record of permanent UNE rates based on TELRIC principles to demonstrate that SWBT's rate structure meets the checklist requirements. The newly modified prices in the M2A are no substitute for a history of pro-competitive, TELRIC rates. SWBT simply has not demonstrated this history in Missouri. SWBT should not be granted entry until the Commission can make a determination that history indicates a full suite of TELRIC-based rates are available in Missouri.

II. SWBT DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO OSS

A. Legal Standard

Checklist Item 2 requires that a BOC provide non-discriminatory access to network elements.[58] In analyzing whether a BOC provides non-discriminatory access to OSS for Section 271 purposes, the Commission has adopted a two-step approach. First, the Commission determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[59] The Commission has traditionally focused on the functionality and capacity of the BOC's OSS in its analysis of this step.

In the second step, the Commission determines if "the OSS functions that the BOC has deployed are operationally ready, as a practical matter."[60] It looks at performance measures and other evidence of commercial readiness. The Commission evaluates performance in the five stages of OSS – pre-ordering, ordering, provisioning, maintenance/repair and billing. In this case, both the general functionality/capability of SWBT Missouri's OSS and its performance at the various stages of the OSS process demonstrate that SWBT is not satisfying the requirements of the competitive checklist in regard to OSS.

B. Functionality and Capacity of SWBT Missouri OSS System

The Commission requires that a 271 applicant demonstrate that its OSS is designed to accommodate both current and projected demand for competing carriers' access to OSS

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[58] 47 U.S.C. § 271(c)(2)(B)(ii).

[59] *SBCTX Order* at ¶ 96.

functions.[61] There are serious concerns about the functionality and capacity of SWBT Missouri's OSS systems. A useful indicator of the overall performance of OSS is the "success ratio." A success ratio represents the ratio of "met" PMs to PMs with a z-score and sample size of 10 or more. A PM is "missed" if it has a z-score of 1.68 or higher.[62] SWBT's success ratios for Missouri were generally the lowest among the five SWBT states. In June 2000, SWBT had a success ratio of 85%, which was the lowest in the five state region. In contrast, Oklahoma had a ratio of 95% for that month. From August 2000 to October 2000, SWBT's success ratio in Missouri steadily dropped from 82% to 79.8%. As Staff concluded, in Missouri, SWBT has "experienced lower performance in terms of successfully meeting PM objectives," and the "performance has remained low in comparison to the other state results, and even declined."[63]

During the months of June, July, and August 2000, thirty-four (34) performance measurement standards were missed two or more times.[64] In regard to the most recent three-month period, SWBT's performance has increased somewhat, but is still at only 89.6% success rate for the OSS measures.[65] This does not provide the type of sustained compliance with performance benchmarks required by the 271 checklist. The Commission should carefully scrutinize performance data to ensure that all outstanding OSS issues have been resolved and SWBT has demonstrated compliance with applicable benchmarks for a sustained period.

There are also concerns about the scalability of SWBT's OSS in Missouri, *i.e.*, its ability to handle increasing amounts of orders. SWBT acknowledged to AT&T that there was a

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60 *Id.*

61 *Id.* at ¶ 97.

62 *Staff's November Comments* at 11.

63 *Id.* at 11.

64 *Id.*

65 CC Docket 01-88, Affidavit of William R. Dysart at ¶ 46. ("*Dysart Affidavit*").

workload problem in one of its service centers that delayed responses to many of its orders.[66] Serious questions remain as to whether SWBT has the capability to scale its OSS to handle the increased volumes.

In the next section, we focus on specific deficiencies in the various stages of SWBT Missouri's OSS.

C. The Stages of SWBT Missouri's OSS

1. Pre-Ordering/Ordering/Provisioning

This Commission has previously focused on "flow-through" rates as an indication of parity in the ordering stage.[67] "Flow-through" refers to orders that are transmitted electronically through the gateway and accepted into the ILEC's back office ordering systems without manual intervention. The flow-through rate often "serves as a yardstick to evaluate whether an incumbent LEC's OSS is capable of handling reasonably foreseeable commercial volumes of orders." In addition, this Commission has focused on an ILEC's "overall ability to return timely order confirmation and rejection notices, accurately process manually handled orders, and scale its systems."[68]

There has been a disparity in flow-through rates between SWBT's retail operations and CLECs for orders submitted through SWBT's LEX interface.[69] LEX is an electronic graphical user interface that provides an option for CLECs that wish to utilize national guideline ordering formats but do not have EDI capability. LEX supports the same activity types of orders as

[66] 10/11 Tr. at 2349.

[67] *BANY* Order at ¶ 160, fn. 488, ¶ 162, fn. 496.

[68] *Id.* at ¶ 163.

[69] *MO PSC 271 Order* at 43.

SWBT's EDI gateway for resale services and UNEs. In February 2001, over 174,900 service orders were originated via LEX.[70]

SWBT has failed to achieve parity for PM 13-02 (Order Process Percent Flow Through – LEX) during each of the last three months.[71] The flow-through rate on the LEX interface was only 70.7%.[72] This meant that nearly a third of the orders using this interface required manual processing. CLECs are finding a lot more manual processing of orders using this interface than they would expect or desire.[73] This manual processing is problematic in that it will increase the time in processing orders, and given the concerns about scalability of SWBT's OSS, the problem may be exacerbated with increasing commercial volumes of orders.

In addition, CLECs have been experiencing difficulties in ascertaining the status of their orders. There are three types of notifications that a CLEC receives in regard to an order – acknowledgments, confirmation, and rejects. Acknowledgments state that the order has been received; confirmations tell the CLEC that the order will be performed on a specific date; and rejects notifies the CLEC that the order cannot be processed and gives the reason. CLECs have been experiencing problems in getting timely firm order confirmations ("FOCs") and reject notices.

SWBT did not meet the benchmark for two of the last three months for PM 5-18 (Percent Firm Order Confirmations (FOCs) Returned On Time For LSR Requests – UNE Loops (1-49 Loops)).[74] Without these acknowledgments, it is impossible for CLECs to know if the order was

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70 CC Docket No. 01-88, Affidavit of Elizabeth Ham at ¶ 130.

71 *Dysart Affidavit* at ¶ 51.

72 *Id.*

73 10/11 Tr. at 2349.

74 *Dysart Affidavit* at ¶ 49.

received by the BOC. Thus, a CLEC is left with the unenviable choice of either assuming the order will be completed on time, or wasting time and resources to try and track down the order in SWBT's system.

CLECs have also experienced much difficulty in receiving timely reject notices. For PM 10.1-01 (% Manual Rejects Received Electronically and Returned Within Five Hours), SWBT consistently failed to meet this benchmark every month from January to October 2000. The benchmark is 97%, and in the month of August 2000, SWBT's performance was 88%.[75]

2. Maintenance/Repair/Billing

The Commenters are very concerned over a recent issue raised in a Public Utility Commission of Texas proceeding regarding a flaw in one of SWBT's systems that may be distorting SWBT's performance data region wide in regard to maintenance and repair.[76] Birch Telecom has discovered a flaw in one of SWBT's legacy systems, LMOS, that results in SWBT not reporting data or reporting data inaccurately for most, if not all, of their Maintenance and Repair Performance Metrics. Since this system is used region-wide, any reporting errors would likely affect the Missouri data.

SWBT utilizes LMOS to inventory network facilities throughout the five-state SWBT territory. SWBT's Operational Support Systems ("OSS") and Local Operations Center ("LOC") use LMOS in various manners, including determining which local service provider by which the end user is serviced for maintenance and repair purposes.[77]

[75] *Staff's November Comments* at 13.

[76] *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas*, TX PUC Project No. 20400, Response of Birch Telecom of Texas Ltd., L.L.P. to Southwestern Bell Telephone Company's Proposals for the Second Six Month Review (March 16, 2001) ("*Birch Response*").

[77] *Id.* at 1.

Once SWBT's OSS processes a Local Service Request ("LSR") submitted electronically by a CLEC, various legacy systems are updated, through the use of service orders that are internal to SWBT, to complete the request made by the CLEC. In this instance, once the service orders post to SWBT's billing system, the service order information is passed on to LMOS to update the LMOS record to indicate the CLEC as the "owner" of the network facilities.[78]

Birch has discovered that this process of updating LMOS has failed for approximately 20-35% of Birch's access lines throughout SWBT's five-state territory.[79] As a result, the LMOS record indicates that another LEC owns the facilities, presumably SWBT retail, or there is an omission of a record being entered at all.[80] This problem greatly affects performance measurements as it means that 20-35% of Birch's trouble tickets have not been included for performance measurement reporting.[81] As Birch noted in its filing:

> The omission of these trouble tickets presents several issues for many of the eight POTS Maintenance and Repair Performance Measurements. In Birch's discussions with SWBT about this issue, SWBT has indicated that determining the exact number of Birch trouble tickets that were omitted due to the LMOS discrepancy is not possible. Determining the comprehensive effect on Performance Measurement results is just as difficult. The eight POTS Maintenance and Repair measurements determine mean time to repair, trouble report rate, repeat report rates and missed repair commitments. The trouble reports are also used to determine performance for installations, including trouble at conversion. It is nearly impossible to quantify, accurately and completely, the effects of the missing trouble tickets for most of the measurements.[82]

As Birch notes, this problem is not limited to itself, but will impact other CLECs in SWBT's five-state area.[83] If CLEC orders are not being accurately updated in the LMOS, then trouble

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78 *Id.* at 2.

79 *Id.*

80 *Id.*

81 *Id.* at 4.

82 *Id.* at 5.

83 *Id.* at 7.